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COMPILATION OF COMMENTS AND PROPOSALS BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS ON THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

CONTENTS

Page

INTRODUCTION 2

COMPILATION OF COMMENTS AND PROPOSALS 2

Governments

AFGHANISTAN 2
CHINA 3

Non-governmental international organization

EXECUTIVE COUNCIL OF THE INTERNATIONAL MARITIME COMMITTEE
(Comité Maritime International (CMI)) 4

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INTRODUCTION

The present addendum 2 to document A/CONF.152/7 sets forth the comments and proposals of Governments and international organizations on the draft Convention on the Liability of Operators of Transport Terminals in International Trade that were received between 6 March and 22 March 1991. During this period comments and proposals were received from the following two Governments and one international organization:

Governments: Afghanistan, China

Non-governmental organization: Executive Council of the International Maritime Committee (Comité Maritime International (CMI))

COMPILATION OF COMMENTS AND PROPOSALS

States

AFGHANISTAN

[Original: English]

After studying with interest the draft, authorities of the Afghan Government wish to make the following comment. As you are aware that Afghanistan is a land-locked as well as one of the least developed countries, the right to transit and access to a water-course are the first priorities to land-locked countries. The numerous resolutions of the General Assembly on measures for transit of land-locked countries adopted in the last two decades is the best evidence of this.

Taking into consideration the relevant resolutions of the United Nations General Assembly as well as the spirit of the Paris Conference on the least-developed and land-locked countries, the Republic of Afghanistan proposes the following addition to the draft Convention which is to be discussed during the Vienna Conference:

It is the wish of the Republic of Afghanistan that a kind of preference be given to exports and imports of the land-locked countries flowing through International Transport Terminals, and dutify the other operators of the International Transport Terminals to grant a favoured status to them. This will help the land-locked countries avoid the existing difficulties in this regard.

CHINA

[Original: Chinese]

The Chinese Government appreciates the efforts made and the progress achieved by the United Nations Commission on International Trade Law in developing uniform rules on the liability of operators of international transport terminals.

We consider that a convention on the subject is both desirable and feasible. Such a convention would facilitate the harmonization of laws and practices in this field in various countries and regions, thus closing a gap left by the existing relevant international instruments; at the same time the provisions on the rights and obligations of terminal operators as set out in the draft Convention are essentially enforceable.

We believe that the draft Convention provides a basis for discussion at the forthcoming diplomatic conference to be held in Vienna.

The Chinese Government will send a delegation to attend the conference, where it will make further efforts for the completion and adoption of the draft Convention.

In addition to the above general observations, the Chinese Government wishes to propose the following revisions to some specific provisions of the draft:

I. Title of the Convention:

The title of the Convention should be revised to read: "Convention on the Liability of Operators of Transport Terminals in International Carriage of Goods".

Reasons:

1. "Transport ... in international carriage of goods" has a wider coverage than "transport ... in international trade" and therefore facilitates application of the Convention to transport of non-trade goods (e.g. transport of goods for purposes of aid, donation or exhibition or supplies for diplomatic missions, etc.). Furthermore, at UNCITRAL's twenty-second session, during discussions on article 1 of the draft Convention, most countries regarded the term "goods" used in the draft Convention as including those non-trade goods mentioned above.

2. The revised title is in better conformity with the purpose of the Convention, that is, to fill the gap left by existing international instruments on the carriage of goods - since most of the liability regimes governing carriage are cast in the form of conventions, it is most appropriate to fill the gap left by those instruments by a convention (see Report of the United Nations Commission on International Trade Law on the work of its twenty-second session (A/44/17), chapter II, section C).

II. The preface should clearly state its legislative purposes, which should, at least, include the following elements:

(1) A new international economic order;

(2) The principle of equality and mutual benefit; and

(3) Promotion of uniformity of laws.

The wording of such a preface may follow the preface to the United Nations Convention on Contracts for the International Sale of Goods.

III. In article 4 (1) (a), after "identifies the goods", it is proposed to add: "and states their condition and quantity in so far as they can be ascertained by reasonable means of checking". Alternatively, the corresponding phrase may be taken out of (b) and made a common wording applying to both subparagraphs (a) and (b).

Reason: Such a statement is needed in both (a) and (b). Although in subparagraph (a) the document is presented by the customer, signing by the operator would mean that he confirms the content of the document and that he is also in some way responsible for it.

IV. In article 9 (a), after "precautions", it would be better to insert the words "and remedies", to make the paragraph begin "To take all precautions and remedies the circumstances may require".

Reasons: When considering the duties, rights and interests of an operator handling dangerous goods, one cannot think only of the precautions taken by him (though this point is very important), but should also take into account all the measures adopted by him, including remedial measures adopted after dangers have actually occurred. In order that the operator can do a more effective job in controlling or reducing the loss of the dangerous goods themselves as well as the loss occasioned to other goods, the operator should be entitled to take measures to eliminate a danger that has already occurred and to claim reasonable compensation for the resulting loss.

Non-governmental international organization

EXECUTIVE COUNCIL OF THE INTERNATIONAL MARITIME COMMITTEE
(Comité Maritime International (CMI))

[Original: English]

1. General Observations

The CMI took an early interest in the project as appears from CMI Doc. 1975 II, pp. 94-114, where Professor Ramberg introduced the matter to the CMI ("Liability of Sea Terminals--some preliminary thoughts"). Although--as it appears from the report by the working group constituted by UNIDROIT to study the matter--the CMI would prefer model rules to a mandatory international

convention, the CMI believes that a convention could become a workable alternative to model rules, provided amendments are made in Art. 13 of the present draft setting forth the important restrictions on contractual stipulations deviating from the provisions of the Convention (see further infra).

2. Applicability of the Convention

It is always difficult to assess beforehand whether or not a mandatory international convention will become successful. Needless to say, it is much more difficult to induce States to ratify mandatory than non-mandatory conventions. The success of international conventions relating to carriage of goods stems from the difficulties to obtain foreseeability and thus assess the relevant risk distribution when the goods are moved from country to country. This makes the objective to unify the law particularly important. The present Convention, however, concerns a domestic activity and, consequently, the incentive to constitute an international instrument is less apparent. Further, it will be necessary to make a clear distinction between such domestic activity with respect to storage and ancillary services where the Convention should apply and other domestic activity in the same area where the Convention should not apply. Thus, some particular problems to properly delimit the scope of application of the Convention arise. If these are not satisfactorily solved it will be very difficult to ensure the success of the Convention.

The CMI does not consider the present method to clarify the "international element", which brings the mandatory rules into operation, to be satisfactory. It is not always possible to "earmark" goods as "involved in international carriage" when the operator is not concerned with the carriage at all but only with storage and handling of the goods before or after such carriage (Art. 2.1). This, indeed, was well noted by the UNIDROIT working group and explains why model rules were preferred to a mandatory international convention. In order to ensure a correct applicability of the Convention another method than reference to "goods involved in international carriage" is needed. It should be noted that the goods are not "involved" in any such carriage before the carriage has started and the services of the operator in the country of dispatch have been terminated.

The same difficulties would not arise with respect to import goods as they at least could be seen to have been involved in international carriage. But apparent difficulties would arise with respect to export goods, since the operator of the transport terminal frequently would not even know the destination of the goods at the time when the contract of service is entered into. Further, with respect to import goods the "international element" would fade away in cases where the goods are held after import by the operator, pending instructions with respect to further domestic storage or on-carriage as the case may be. For these reasons, the CMI suggests that Art. 13 be amended so that the provisions of the Convention only become mandatory when the operator has opted in the Convention for the contract concerned. Such an approach would, in the view of the CMI, enhance future success of the Convention and thus promote uniformity of the law much better than a convention depending for its mandatory applicability on vague criteria, such as "involved in international carriage".

3. Documents and EDI

It is to be expected that within the field of transport and storage, documentary practices will soon be replaced by Electronic Data Interchange (EDI) messages (see e.g. the revised Incoterms 1990). In order to account for this development it is not enough to stipulate that the document or signature on the document may be issued "in any form" (Art. 4.3) or "by ... electronic means" (Art. 4.4). Art. 4 should provide that the document could be replaced by an equivalent electronic data interchange message (cf. Incoterms 1990 A 8 clauses).

4. Loss of right to limit liability (Art. 8)

It has been an over-riding objective to draft provisions of the Convention in such a manner as to make them compatible with international conventions governing any preceding or subsequent carriage of the goods. This will facilitate for claimants to assess their risk beforehand and also simplify recourse actions by carriers against the operators of transport terminals. However, in this respect, Art. 8 constitutes an important, and therefore unacceptable, exception to the principles gevering carriage of goods by sea and multimodal transport. Under the 1978 Hamburg Rules and the 1980 Multimodal Transport Convention, the carrier does not lose his right to limit liability unless the blameworthy bahaviour could be attributed to somebody acting on the managerial level in the company. Thus it is necessary to delete the words "or his servants or agents" added after "the operator himself" in Art.8 as drafted.

The CMI is aware of the fact that Art. 8 in this respect reproduces the principle of CMR related to international road carriage. But with respect to such carriage the carrier is normally identical with the operator of the transport terminal and, therefore, the Convention will in practice mainly concern goods involved in maritime carriage amd multimodal transport. For this reason, it is in the view of the CMI indispensible to make this impoitant article compatible with the corresponding rules in the Hamburg Rules and the Multimodal Transport Convention.

The CMI expresses its satisfaction with the important work performed so far and expresses the hope that the Convention will materialize in the form suggested above and thus contribute to a better unification of the law in this important field.